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No. 90-953

IN THE

Supreme Court of the United States

October Term 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* WITH BRIEF *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

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The National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the accompanying brief as amicus curiae. The written consent of the Petitioner has been obtained and filed with the Clerk of the Court. The Respondent has not consented.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating the retail rates and services of electric, gas and telephone utilities operating within their respective jurisdictions. These officials have the obligation under State law to assure the establishment and maintenance of such services within respective franchised utility service territories as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions which

are just, reasonable, and nondiscriminatory for all consumers.

In this case, this Court has been asked to review the relationship of Federal antitrust law and traditional and pervasive State regulatory programs through which public utilities and common carriers provide their essential services to the public. In the decision for which Petitioner seeks the Court's review, the U.S. Court of Appeals for the Eleventh Circuit held, inter alia, that one of the fundamental aspects of State utility regulation -- the requirement that utilities operate in exclusive franchise territories -- can be properly enjoined under the provisions of Section 2 of the Sherman Act. As such, the decision strikes at the heart of the State regulatory programs administered by the members of the NARUC which are based on the long-established and settled principle that duplication of utility facilities in a given

geographic market will result in inefficient and less affordable service to the consuming public. In the language of this Court's formulation of the State action defense to Federal antitrust liability, the creation and maintenance of franchised utility service territories has been and continues to be "affirmatively expressed" and "actively supervised" regulatory policy in virtually every State in the Nation.

If broadly applied, the Court of Appeals' decision will have serious consequences for the regulatory policies and procedures of each of the NARUC's member commissions. Therefore, we believe that the amicus participation of a national organization such as the NARUC, which represents each of these State agencies, is justified. The NARUC respectfully requests that the accompanying brief be accepted for filing.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as amicus curiae in support of the petition for writ of certiorari due to the substantial harm the decision below will have upon the regulation of public utilities

by its member State regulatory commissions.

As described in the preceding motion, the NARUC is the national organization which represents the collective interest of the State regulatory utility commissions exercising jurisdiction over natural gas, electric and telephone utilities operating within their respective borders. The NARUC's member commissions, generally called "public service commissions" or "public utility commissions" (PSCs or PUCs), include the Florida Public Service Commission (FPSC), which also seeks amicus status in this case in support of the petition for writ of certiorari.

In the decision for which Petitioner City Gas Company of Florida (City Gas) seeks this Court's review, the United States Court of Appeals for the Eleventh Circuit affirmed a decision of the United States District Court for the Southern District of Florida which held, inter alia, that City Gas, a

natural gas distribution company regulated by the FPSC, violated section 2 of the Sherman Act, 15 U.S.C. sec. 2 (1990) by acquiring and maintaining an exclusive service territory with the approval of the FPSC as affirmed by the Supreme Court of Florida.[1] By its decision, the Court of Appeals accepted the District Court's ruling that City Gas' 1960 territorial agreement with another gas distributor, Peoples Gas System, Inc., was not exempt from antitrust liability under the "State action" doctrine established by this Court in its decision in Parker v. Brown, 317 U.S. 341 (1943) and its progeny. Specifically, the Court below held

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[1] The panel opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 880 F.2d 297 (11th Cir. 1989). The per curiam opinion and dissents of that Court en banc (Petitioner's Appendix B) are reported at 912 F.2d 1262 (11th Cir. 1990). The opinion of the District Court (Petitioner's Appendix D) is reported at 665 F. Supp. 1493 (S.D. Fla. 1987). Subsequent reference will be made to these decisions, as they appear in Petitioner's Appendix, in this form: App. at ____.

that the State action defense was unavailable because the territorial agreement did not constitute "a clearly articulated and affirmatively expressed" regulatory policy of the State of Florida, and was not "actively supervised" by the FPSC. In Question 2 of its Petition for a Writ of Certiorari, City Gas has asked this Court to review these issues.

The Court of Appeals' reasoning makes this case important to State regulators for the following reasons: first, by holding that the FPSC's approval of the territorial agreement, as affirmed by the State's Supreme Court, was insufficient evidence of the State's regulatory policy (App. at A-10), the Court of Appeals has greatly restricted the regulatory flexibility of the State commission; second, by holding that the FPSC insufficiently supervised the agreement because the Commission only "looked at this agreement" some time in the

past (App. at A-11), the Court of Appeals has sanctioned intrusive Federal oversight and review of State regulatory practices and procedures. In both cases, the Court has gone far beyond the State action tests this Court has applied in the past to other State regulatory policies and practices.

Accordingly, this case raises important issues, which should be addressed by this Court, concerning the manner in which State commissions, legislatures and courts establish and supervise their policies for the economic regulation of utilities and common carriers. As the National representative of the State commissions, the NARUC's interest in addressing these State action issues is strong, compelling its participation in this case.[2]

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[2] Consistent with this Court's Rule 37.1, the NARUC will not repeat the discussion and analysis of the State action doctrine contained in the Petition for Writ of Certiorari and the amicus brief of the FPSC. The NARUC supports those arguments.

SUMMARY OF ARGUMENT

By its decision, the Court of Appeals has sanctioned the use of Federal antitrust law to scrutinize and reject a regulatory practice basic to utility regulation in virtually every State: the establishment of exclusive franchised service territories in which utilities are legally obligated to provide service to all consumers located within the territory. By faulting the manner in which the State of Florida has established and implemented its service territory policy, the Court below has called into question similar practices across the country. Accordingly, this case raises issues of broad National scope and import which should be reviewed by this Court.

In addition, the Court of Appeals has misconstrued this Court's decisions in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 87 (1980) and Southern Motor Carriers Rate Conference

v. United States, 471 U.S. 48 (1985) to assess State policymaking and regulatory practices and procedures far beyond any intrusion this Court, or other Courts of Appeals, have sanctioned. And the issue reaches beyond the question of franchised service territories. Under the Court of Appeals' reasoning, any policy or practice established by a State regulatory commission under general statutory authority, such as the common directive to ensure "just and reasonable" rates, will be at risk, even if the decision of the State commission has been affirmed by the State's highest court as consistent with the intent of the State's legislature. Also, the Court of Appeals opinion would interfere with the way State commissions exercise their regulatory authority by forcing commissions to allocate scarce resources to undertake frequent reviews of utility practices long since determined to be in the public interest. In

short, if left unreviewed, the ruling below will limit State flexibility and encumber State regulators with direct, repeated and intrusive oversight by the Federal judiciary, precisely the result that the State action doctrine was intended to prevent.

ARGUMENT

LEFT UNREVIEWED BY THIS COURT, THE COURT OF APPEALS' DECISION WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES

I. This Court has protected the flexibility of State practices and procedures for utility regulation

As this Court has recently acknowledged, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983). More recently, the Court has

reaffirmed the constitutional principle that in discharging this important function, the State regulatory commissions have broad authority "to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public." Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989) (Duquesne). In Duquesne, the Court observed that State regulation of utilities providing retail service to their customers is a difficult undertaking, requiring the consideration of a multitude of factors: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." Id. at 314. Accordingly, this Court has been loathe to restrict the flexibility of regulatory bodies, both State and Federal, to exercise their "economic judgment" on behalf of utility ratepayers. Id., see also, FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944);

Permian Basin Area Rate Cases, 390 U.S. 747 (1968); and Mobil Oil Exploration v. United Distribution Companies, 59 U.S.L.W. 4054, 4058 (January 8, 1991), ("'just and reasonable' requirement accords [the Federal Energy Regulatory Commission] broad ratemaking authority. . . .").

In Duquesne, the Court also described the role that regulatory bodies such as the FPSC perform within State government. "[T]he Pennsylvania PUC is essentially an administrative arm of the legislature." 488 U.S. at 313. Accordingly, like legislative bodies, State commissions "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." Id. at 313-314, citing Permian Basin, supra, 390 U.S. at 767 (emphasis in original). In short, in its analysis of the constitutional limitations

on commission authority, this Court, both historically and quite recently, has sought to protect the flexibility and discretion through which regulatory judgment is exercised by both State and Federal commissioners.

Similarly, this Court's recent antitrust decisions applying the State action doctrine have consistently recognized the need to preserve regulatory flexibility. In applying the two elements of what has come to be known as the Midcal test -- that private anticompetitive conduct which is conducted pursuant to an "affirmatively expressed and clearly articulated" State policy which is "actively supervised" by the State is exempt from antitrust liability -- the Court has not attempted to interfere with the traditional tools State commissions have used to regulate utility rates and

services.[3] The Court has not used the Midcal formulation to micromanage State utility policymaking, whether at the PUC or legislative level, nor has the effectiveness of State regulation been examined with a Federal microscope to determine how "actively" regulators have discharged their responsibilities.

For example, with respect to the "clear articulation" prong of Midcal, the Court in Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985) held that a long-standing decision of the Mississippi Public Service Commission allowing trucking companies to collectively file intrastate rate proposals was sufficient to provide State action immunity to private truckers participating in the collective activity. Id. at 63-64. The Mississippi commission made this decision pursuant to a generalized

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[3] See, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 87, 105 (1980).

"just and reasonable" rate standard, and not specific authorization from the State's legislature. The Court found this expression of State policy sufficient:

> The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of Parker immunity.
>
> 471 U.S. at 63-64
> (citations omitted)

Even though the Mississippi legislature had enacted no specific legislation with respect to collective ratemaking, the Court attributed to the State as sovereign the decision of its regulatory commission authorizing such activities. Id. at 65. (the State of Mississippi, by the decision

of its public service commission, "has articulated clearly its intent to displace price competition among common carriers with a regulatory structure.")

As in the case of the constitutional limitations on State commission actions, the Court's reasoning in Southern Motor Carriers provides ample evidence that in the context of Federal antitrust litigation, the States are not to be tightly held to specific "tests" which restrict the regulatory flexibility of their commissions. And the reason why it is important to ensure this result is clear:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate a state policy would diminish, if not destroy, its usefulness.
>
> 471 U.S. at 64

Stated differently, if the Midcal formulation's "affirmative expression" standard is construed to require precise compliance by State regulatory commissions with rules made on a case-by-case basis by the Federal judiciary, agency regulation of utilities and carriers will be difficult, if not impossible.

Similar respect for State discretion and flexibility must also apply with respect to the "active supervision" element of the Midcal formulation of the State action doctrine. Until this case, the NARUC is unaware of any decisions of this Court which have assessed a State's "active supervision" of a utility or carriers alleged anticompetitive conduct.[4] However, in a

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[4] In Southern Motor Carriers, supra, "the Government . . .conceded that the relevant States, through their agencies, actively supervised the conduct of private parties." While the Court has assessed State supervision of other industries such as the medical profession, Patrick v. Burget, 108 S. Ct. 1658 (1988), it has not yet examined State utility regulation. This

recent decision, the United States Court of Appeals for the First Circuit reversed a ruling of the Federal Trade Commission which had found that the State of Massachusetts had not sufficiently and actively supervised intrastate motor carrier ratesetting practices. New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064 (1st Cir. 1990). In rejecting the FTC's decision, the Court of Appeals stated

> The FTC's position, at bottom, seems to be that the "active supervision" prong [of Midcal] necessitates an inquiry by the FTC into whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness. The FTC would, in effect, try the state regulator. We think this goes to far.
>
> 908 F.2d at 1075

Rather than a means to "try the regulator", the active supervision standard simply ensures that regulatory procedures are in

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is hardly surprising, given that regulation of utilities is an area in which States pervasively and vigorously exercise their police powers. See, Arkansas Electric Cooperative, supra, 461 U.S. at 377.

place to address the alleged anticompetitive conduct:

> The principles of federalism embodied in Parker dictate the sufficiency of a degree of scrutiny on this level. It is not the province of the federal courts nor of federal regulatory agencies to sit in judgment upon the degree of strictness or effectiveness with which a state carries out its own statutes. It is sufficient that a meaningful scheme of regulation is in existence and that there are sufficient indications that active under the scheme is taking place.
>
> Id. at 1076
> (Fn. omitted and emphasis in original)

The First Circuit's reading of the "active supervision" prong is entirely consistent both with this Court's approach to the "clear articulation" prong in Southern Motor Carriers, and the "end result" test applied by this Court in Hope Natural Gas, supra, and Duquesne, supra to utility ratemaking. This is hardly surprising. It makes little sense for the Federal courts to defer to regulatory expertise for purposes of constitutional analysis (Hope and Duquesne) only to

rigidify State regulatory policymaking and procedures through the threat of antitrust proscription. In sum, the NARUC submits that the State action doctrine, intended to vindicate principles of comity and Federalism, should hardly be a club by which Federal agencies and courts restrict or reorder State regulatory policies and practices.

II. The effect of the Court of Appeals decision

Against this background, the decision of the court below stands in stark relief. In its review of the Florida PSC's regulation of the City Gas territorial agreement, the Court of Appeals held that neither prong of Midcal was satisfied: the State of Florida's regulatory policy was not "clearly articulated and affirmatively expressed" because the FPSC had "expressed doubt" about its authority to approve territorial agreements (App. at A-10), and

the FPSC's regulation of the agreement should have been "a more vigorous, probing supervision" (App. at A-11).

The NARUC agrees with the Petitioner that these holdings are not consistent with this Court's reasoning in its recent State action decisions. However, our concern with the Court of Appeals' ruling is intensely practical. The Court's decision has the effect of restricting regulatory flexibility in a number of ways, each of which will harm State regulation of utilities and carriers.

First, the Court held that the State's service territory policy with respect to gas distribution utilities was insufficient to satisfy Midcal because the legislature had not specifically addressed gas distributors by legislation, and because of the FPSC's "doubts" (App. at A-10). Unless reviewed and reversed by this Court, the effect of this holding is readily apparent. The FPSC, and presumably the commissions of all States

in the Eleventh Circuit, must now reexamine their respective regulatory policies to determine if they need to approach their legislatures for more specific statutory authority to require regulated utilities and carriers to take actions which a private litigant may challenge under Federal antitrust law. These commissions must necessarily question whether their statutory commands to determine whether utility rates are "just and reasonable," or whether new utility service is "in the public convenience and necessity" are specific enough to protect even long-standing regulatory policies. The commissions should be particularly concerned if they have transferred a regulatory policy or practice statutorily prescribed for one utility type to another utility type. Further, these commissions cannot rest on the fact that a given regulatory practice has been explicitly affirmed through State court

review. Under the Court of Appeals ruling, these are now "questions of federal antitrust law." App. at A-10.[5]

Secondly and ironically enough, while they are approaching their legislatures for more specific statutory authority, the commissions of the Eleventh Circuit should not undertake any administrative review of settled policies about which they may have "some doubt." Under the reasoning of the court below, a State commission's mere issuance of a notice of proposed rulemaking

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[5] As Judge Johnson in his en banc opinion correctly observed, the panel's holding means that State regulatory commissions can no longer rely on rulings of their State courts to authoritatively determine "the content. . .of the state law to which federal courts apply the Midcal test. . . ." App. at B-8, citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44-45 n. 8 (1985). At least in the context of Federal antitrust litigation, the Supreme Court of Florida, which approved the very territorial agreement at issue in this case, City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965), is no longer the court of last resort concerning the regulatory policies the FPSC is authorized to adopt and implement.

to reopen regulatory issues in light of changing industry circumstances may be subsequently interpreted by a Federal antitrust court as having undermined the State's ability to "clearly articulate and affirmatively express" its regulatory policies. In either case, the Court of Appeals' decision has diminished the ability of State legislatures and commissions to "deal with problems unforeseeable to, or outside the competence of, the legislature." Southern Motor Carriers, supra, 471 U.S. at 64.

So too with respect to the Court of Appeal's ruling on the "active supervision" prong of Midcal. Here, the court below found that the FPSC did not sufficiently supervise its policy on territorial agreements because the Commission only "on occasion, some 15 to 25 years ago, looked at this agreement." App. at A-11. In the Court's view, Midcal requires "a more

vigorous, probing supervision." Id.

The problems caused by this holding are patent. How is the FPSC to know how frequently it needs to review its prior decisions, particularly in an area of regulation such as the establishment of service territories which are invariably intended to be long-lived? Further, how much more "vigorous" can State supervision be than the issuance of a binding order affirmatively finding a given utility practice to be "in the public interest?"[6] The Court of Appeals decision, of course, provides no answers to these important questions. However, regardless of the strain on their time and resources, State commissions in the Eleventh Circuit would be

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[6] The FPSC's order approving the City Gas territorial agreement found "that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities. . .are definitely in the public interest and should be encouraged and approved. . . ." App. at I-2.

well-advised to undertake a searching reexamination of even long-settled utility practices if they wish to avoid the kind of result suffered by the FPSC.[7]

Clearly, this Court did not intend to impose these sorts of restrictions upon State regulatory flexibility when it decided Midcal and Southern Motor Carriers. The problems created by the Eleventh Circuit's decision are readily apparent: by definition, the regulatory policies and practices State commissions either authorize or impose on utilities and carriers operate in an economic environment based on monopoly

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[7] By contrast, the First Circuit in New England Motor Rate Bureau, supra, "agree[d] with commentators who state that a court. . .should not scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma." 908 F.2d at 1076 n.18. In so doing, the court indicated its conviction that Federal courts should provide State regulators with the same sort of regulatory discretion in antitrust litigation as they are required to do under the constitutional standards of Hope and Duquesne. Id.

service providers. Accordingly, virtually every decision a State regulatory body makes, including decisions to deregulate industry practices, raises the possibility of anticompetitive concerns. The purpose of the State action doctrine established by Parker and its progeny is to insulate regulatory policies established by the State as sovereign and administered by expert agencies from repeated and intrusive examination by a Federal judiciary ill-equipped for this task. The decision below does not meet the principles of Federalism that Parker embodies, and accordingly, must be reviewed by this Court.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the Petition for Writ of Certiorari be granted.

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